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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RICHARD EDELMAN,
12 Plaintiff,
13 v.
14 UNITED STATES SECURITIES AND
15 EXCHANGE COMMISSION,
16 Defendant.

Case No.: 3:15-cv-02750-BEN-BGS

**ORDER DENYING JOINT MOTION
FOR PROPOSED BRIEFING
SCHEDULE**

17 Before the Court is the joint motion filed by Plaintiff Richard Edelman and
18 Defendant United States Securities and Exchange Commission (“SEC”), wherein the
19 parties represent that they “seek to resolve the issues raised by the pending motions for
20 summary judgment . . . and propose a procedure for resolving the remaining open issues
21 raised by the pleadings and records in this matter.” (Docket No. 38 at p. 2,¹ “Joint
22 Motion.”) For the following reasons, the Joint Motion is **DENIED**.

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28 ¹ All references to page numbers in the parties’ moving papers in this Order are to the
page numbers generated by the CM/ECF system.

BACKGROUND

The factual background of this case is well known to the parties and set forth in detail in the Court's September 27, 2017 Order, which the Court incorporates by reference. (*See* Docket No. 31 at pp. 2-4.) Accordingly, this overview is limited to the facts relevant to resolution of the Joint Motion.

This action is based on Plaintiff's claim that the SEC failed to comply with its obligations under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq. to respond to his FOIA requests. Plaintiff's FOIA claims are based on two written FOIA requests to the SEC's Office of FOIA Services ("FOIA Office").

The first request was submitted on February 9, 2015, requesting:

[A]ll documents, records, material of any nature concerning investigation in the matter of Empire State Realty Trust MNY-08894. This would include Wells Notices and Wells Submissions in response. This FOIA also requests similar documents of any other SEC investigation concerning Empire State Realty Trust.

(Docket No. 1, Compl., Ex. 1 at p. 2.) In response to this request, the SEC produced and withheld a number of documents, which Plaintiff appealed as part of the administrative appeals process.

During the SEC's review of Plaintiff's appeal, Carin Cozza, a Senior Attorney for the Office of General Counsel for the SEC, discovered the potential existence of approximately 44,000 documents on two CDs that was produced by Malkin Holdings, LLC ("Malkin") to an SEC attorney that were "likely responsive" to Plaintiff's first FOIA request. The SEC subsequently placed the two CDs in a queue for complex requests because of the time needed to process the volume of documents.

The second FOIA request was sent on March 11, 2015, and requested the "SEC Division of Enforcement Case Closing Report in the matter of Empire State Realty Trust Inc." (Compl., Ex. 14.) After exhausting his administrative remedies for both of these requests, Plaintiff filed the instant lawsuit asserting under the FOIA.

1 On September 27, 2017, the Court denied without prejudice the SEC's motion for
2 partial summary judgment, and granted in part and denied in part Plaintiff's cross-motion
3 for summary judgment. (Docket No. 31.) The Court further ordered production of an
4 index (the "Malkin Index") that purportedly itemized the 44,000 Malkin documents, and
5 issued a scheduling order for the SEC's renewed motion for summary judgment and
6 Plaintiff's response and cross-motion for summary judgment. (*Id.*)

7 Subsequently, on November 17, 2017, the SEC filed its pending renewed motion
8 for partial summary judgment. (Docket No. 37.) However, on December 11, 2017, the
9 parties' filed the instant Joint Motion indicating that they had conditionally resolved the
10 issues raised in the SEC's pending renewed motion, contingent upon the Court's issuance
11 of a new scheduling order regarding motions for summary judgment as to 118 newly
12 requested records. (Docket No. 38.) That issue is not properly before the Court, and
13 therefore the Joint Motion must be denied.

14 DISCUSSION

15 "In order to maintain a judicial action under FOIA, a plaintiff must first request
16 documents from an administrative agency and if his request for documents is refused
17 must exhaust his administrative remedies before filing a court action." *Gasparutti v.*
18 *United States*, 22 F. Supp. 2d 1114, 1116 (C.D. Cal. 1998) (citing *U.S. v. Steele*, 799 F.2d
19 461, 465–66 (9th Cir. 1986) ("The complainant must request specific information in
20 accordance with published administrative procedures and have the request improperly
21 refused before that party can bring a court action under the FOIA.")). "Where a plaintiff
22 has not complied with these procedures, district courts lack jurisdiction over the claim
23 under the exhaustion doctrine and will dismiss the claim for lack of subject matter
24 jurisdiction." *Id.*


25 Here, according to the Joint Motion, after the SEC produced the Malkin Index
26 pursuant to the Court's September 27, 2017 Order, Plaintiff identified 118 new records he
27 wished be produced. (Docket No. 37 at p. 2.) This is corroborated by the SEC's renewed
28 summary judgment motion, which represents that after the SEC produced the Malkin

1 Index to Plaintiff's counsel on October 2, 2017, Plaintiff's counsel emailed a request for
2 118 of the records identified in the index. (Docket No. 37 at p. 4.) The SEC's motion
3 further relates that it has not fully adjudicated Plaintiff's request for these records.
4 Moreover, it appears from the record that the requested records were discovered and
5 placed in a queue for processing after Plaintiff lodged the two FOIA requests that are the
6 subject of this action. (*See* Docket No. 22-2, Decl. of Carin Cozza ¶ 16.)

7 Thus, it does not appear to the Court that Plaintiff has exhausted his administrative
8 remedies with respect to the newly requested records, or even that he has made a formal
9 FOIA request for those records. As a result, the Court lacks subject matter jurisdiction
10 over this newly raised claim. Therefore, the Joint Motion is **DENIED**.

11 **IT IS SO ORDERED.**

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13 Dated: December 12, 2017

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15 Hon. Roger T. Benitez
16 United States District Judge
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